Supreme Court, U.S.
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No. 10-639

IN THE

Supreme Court of the United States

RUSSELL W. ROACH,

Petitioner,

v.

JEFF WRIGLEY,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 5, 2010

QUESTIONS PRESENTED FOR REVIEW

Whether federal district courts must resolve all claims for relief raised in non-capital writs of habeas corpus, regardless of if relief is ultimately granted or denied.

Whether certificates of appealability should be issued, pursuant to 28 U.S.C. § 2253(c)(2), in cases where a federal district court denied habeas corpus relief and failed to address any claims for relief raised in a petition for habeas corpus.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Russell W. Roach, respectfully petitions the Court for a Writ of Certiorari to review the judgment entry of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner a certificate of appealability is reproduced at App. 1. The United States District Court for the Southern District of Indiana Entry Discussing Petition for Writ of Habeas Corpus is reproduced at App. 2. The District Court's Entry Concerning Selected Matters consolidating Petitioners' two writs of habeas corpus is reproduced at App. 12., the District Court's Entry denying Petitioner a certificate of appealablity is reproduced at App. 14, and the Seventh Circuit Order denying a rehearing is reproduced at App. 16.

JURISDICTION

The decision of the court of appeals was entered July 27th 2010. A timely petition for rehearing was denied on August 16, 2010. App. 16 This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the Due Process Clause of the Fourteenth Amendment, Section 1, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Section 2254 and Section 2253 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in relevant parts:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

> § 2253 (b) There shall be no right of appeal from a final order in a proceeding to test the validity of

a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Russell W. Roach was convicted of a burglary in 1983. He appealed, and the conviction was affirmed by the Indiana Court of Appeals on appeal in *Roach v. State*, Case No. 49A05-9708-CR-358 (Ind. Ct. App. Nov. 20, 1998). Roach filed a Petition for Post-Conviction Relief which was denied by the trial court. Roach appealed the denial of Post-Conviction Relief in that case, and the denial was upheld by the Indiana Court of Appeals in *Roach v. State*, Case No. 49A04-0312-PC-621 (Ind. Ct. App. February 15, 2005).

Roach was convicted of murder in 1995. His conviction was affirmed on direct appeal to the Indiana Supreme Court in *Roach v. State*, 695 N.E.2d 934 (Ind.

1995). Roach then sought post-conviction relief, which was denied by the trial court. An appeal from the denial of post-conviction relief ensued. The trial court's denial of relief was affirmed by the Indiana Court of Appeals in *Roach v. State*, Case No. 49A05-0312-PC-621 (Ind. Ct. App. December 6, 2004).

Roach filed a federal Petition for Habeas Corpus review of his burglary conviction and sentence on July 1, 2005, in the matter of *Roach v. Ind. Atty General, Stephen Carter and Cecil Davis, Warden of I.S.P.*, in Case No. 1:05-cv-0986-JDT ("Habeas Petition I"). Roach then filed a separate Petition for Habeas Corpus review of his murder conviction and sentence on December 5, 2005 ("Habeas Petition II"). The proceedings under Habeas Petition I were consolidated by order of the District Court with the Habeas Petition II on August 14, 2006, under the present case. App. 12.

On December 1, 2009, the District Court issued its "Entry Discussing Petition for Writ of Habeas Corpus" ("Entry"). App. 2. In that Entry the District Court only addressed Habeas Petition II, even though both petitions had been consolidated under this case. The District Court later issued an Entry denying Roach a Certificate of Appealability ("COA") on January 6, 2010. App. 14.

Roach appealed to the United States Court of Appeals for the Seventh Circuit requesting the issuance of a COA on July 16, 2010. On July 27, 2010, the Seventh Circuit issued an Order denying a COA. App. 1. Roach then filed a Petition for Rehearing on August 10, 2010, which was denied on August 16, 2010. App. 16

Except for being consolidated into the present case, the constitutional claims in Habeas Petition I have never been addressed by the lower federal courts.

There has been no attempt to explain why these claims were not granted or did not warrant a discussion on the merits.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit did not follow precedent of this Court when it denied the Petitioner a COA. In October 2009, this Court held in *Corcoran v. Levenhagen* that the Seventh Circuit "erred in disposing of [habeas corpus] claims without explanation of any sort." *Corcoran v. Levenhagen*, 130 S. Ct. 8, 9 (2009). This decision affirmed the importance of having thorough examination of federal habeas corpus claims. The Seventh Circuit did not follow *Corcoran* here because it denied a COA and upheld the dismissal of habeas corpus claims without any explanation.

The Seventh Circuit dismissal here is in direct conflict with the precedent of other circuits. This case exemplifies a circuit split which exists over whether district courts must specifically address and rule on every individual habeas corpus claim.[1] Although *Corcoran* seems to resolve any confusion, the question of whether district courts must consider all claims in petitions for habeas corpus requires clarity because of the Seventh Circuit failure to act in this case.

A definitive ruling by this Court requiring the complete resolution of non-capital habeas claims at the district court level is extremely important. In the interests of avoiding piecemeal habeas corpus litigation and supporting the finality of judgments, district courts must be required to decide all claims when

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[1]The dissent in *Blazak* discusses the existence of a circuit split on this issue. *Blazak v. Ricketts*, 971 F.2d 1408, 1417-18 (11th Cir. 1992) (J. Beezer, Dissenting).

making a decision on a writ of habeas corpus. Also, this Court should defend non-capital habeas rights against erosion. Finally, the ruling of the Seventh Circuit in this case could be an attempt to limit *Corcoran* to capital cases and this question deserves resolution before the circuits become divided on it.

The Seventh Circuit erred in not granting a COA in this case. A criminal defendant must be able to have their day in court regarding possible constitutional violations by the state courts below. Here, Petitioner was completely denied this right when the district court failed to address his claims in Habeas Petition I, pursuant to the 28 U.S.C § 2254. The Seventh Circuit compounded this injustice by not granting the Petitioner a COA.

I. The Seventh Circuit decision here is in direct conflict with this Court's holding in *Corcoran v. Levenhagen* because that court failed to consider clearly unresolved habeas corpus claims.

The Seventh Circuit decision here directly conflicts with this Court's holding in *Corcoran*. *Corcoran v. Levenhagen*, 130 S. Ct. 8, 9 (2009). In that case, this Court vacated and remanded a decision of the Seventh Circuit because that court rendered its decision "without mentioning Corcoran's other sentencing claims." *Id.* This Court demanded that all claims be addressed regardless of the reasoning for dismissing them. *Id.* Here the District Court did not in any way address one entire petition for habeas corpus containing numerous independent constitutional claims. *See* App. 12-13. In *Corcoran*, this Court set a standard for habeas claims, that they must all be resolved. The Seventh Circuit ignored this standard

when it denied the Petitioner's request for COA. The Seventh Circuit let a decision stand that was in direct opposition to recent precedent of this Court.

Corcoran does not differ from the present case such that it justifies the Seventh Circuit's decision here. Although Corcoran's case involved a death sentence, the Court's reasoning is equally applicable to non-capital habeas cases. *Corcoran* involved the degree to which explanation is required on habeas corpus claims generally. Furthermore, although it was the Seventh Circuit and not the District Court that ignored the claims in *Corcoran*, it is not relevant which court ignored the claims. The intolerance of "disposing . . . of claims without explanation of any sort" is equally offended, regardless of if it happens at the district court or the appellate court level. *Id.* A petition for habeas corpus cannot simply be ignored by the federal courts, and this was the principle this Court upheld in *Corcoran*.

This Court has supported in other cases that claims must be resolved at the district court level. In *Rose v. Lundy*, this Court commented on the value in having district courts revolve any habeas claims, stating that it will provide "for a more focused and thorough review." *Rose v. Lundy*, 455 U.S. 509, 520 (1982). If substantive issues are ignored by a district court, this Court has remanded them for consideration. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding a habeas claim back to the district court because it failed to address the petitioner's actual innocence claim); *see, e.g. Cone v Bell*, 129 S. Ct. 1769 (2009). The writ of habeas corpus is important to safeguarding constitutional rights and this Court has recognized the importance of its continued efficacy. *See McCleskey v. Zant*, 499 U.S. 467, 496 (1991) (describing the

importance of making sure habeas corpus writs are not abused). Failing to address habeas corpus claims is in opposition to precedent of this Court.

The Seventh Circuit should have followed *Corcoran* in this case and granted COA. Instead, it violated this Court's holding at the expense of Petitioner's right to have his claims heard. This Court should grant Certiorari to make sure the holding in *Corcoran* is clear to the Seventh Circuit and other federal courts.

II. Circuit courts have taken opposing views on whether district courts must address all habeas claims and this Court's intervention is necessary to resolve the conflicting decisions.

This Court should grant Certiorari to resolve the discrepancy in the legal resolution of federal habeas corpus claims. The lower courts are split regarding if they will remand cases where the district court did not directly address habeas claims. The Eleventh Circuit has the clearest rule on how district courts should handle habeas claims. In *Clisby v. Jones* the Eleventh Circuit determined that it was unable to hear habeas claims on appeal that had not been resolved by the district court. 960 F.2d 925, 936 (11th Cir. 1992). That court held that it lacked jurisdiction and remanded the case back to the district court to address the unaddressed issues *Clisby v. Jones* ,960 F.2d at 935. Going a step further, commenting on the amount similar cases it had remanded, the Eleventh Circuit exercised its supervisory power and instructed the district courts to "resolve all claims for relief raised in a petition for writ of habeas . . . regardless of whether habeas is granted or denied." *Clisby v. Jones*, 960 F.2d

at 936. The Eleventh Circuit would have granted COA to remand this issue to the district court.

In *Blazak v. Rickets*, the Ninth Circuit expressly declined to adopt the Eleventh Circuit's rule issued in *Clisby*. 971 F.2d 1408, 1415 (9th Cir. 1992). In *Blazak*, the dissent argued that *Clisby* should be extended in the Ninth Circuit because the decision effectively resolved a circuit split on issue of how much resolution a district court must give for habeas corpus, between the Eleventh, Eighth, and Fifth Circuits. *Blazak v. Ricketts*, 971 F.2d 1408 (11th Cir. 1992) (J. Beezer, Dissenting). The majority expressly declined to follow the Eleventh Circuit's decision in *Clisby* requiring all habeas corpus claims to be resolved at the district court level, claiming "there is the potential that some cases that have already been argued and are nearing decision would have to be remanded. Such a course is ill-advised." *Blazak v. Ricketts*, 971 F.2d 1408, 1417-18 (11th Cir. 1992). Thus, the Eleventh Circuit has issued a rule that all claims must be addressed at the district level for writs of habeas corpus, while the Ninth Circuit has expressly declined to adopt this rule.

These two circuits are in opposition and based on this case, the Seventh Circuit would agree with the Ninth Circuit. Although this split seems to be resolved by this Court's decision in *Corcoran*, the Seventh Circuit has maintained this conflict in the United States Courts of Appeals by not issuing a COA in this case. Deciding the present case would resolve this issue completely, especially in conjunction with *Corcoran*. This Court could completely settle the issue of what degree of explanation lower federal courts must give regarding their dispositions on writs for habeas corpus. Congress enacted the AEDPA that was to apply to all claims of habeas corpus, but currently, this legislation

is not being enforced uniformly and Court action is necessary to remedy this situation.

III. Uniformity in the requirements for district court handling of habeas claims like this one is of great national importance.

The resolution of writs of habeas corpus like the Petitioner's implicates important other considerations. These are common cases in the federal courts and an effective and fair strategy for their resolution is essential to the continued efficacy of the lower federal court system. Additionally, this case presents a possible differentiation between capital and non-capital habeas corpus cases which requires clarification by this court.

A. Habeas petitions are very common and their effective resolution is essential to judicial economy and the proper administration of justice.

Non-capital habeas corpus claims, such as Petitioner's, are common in the federal courts and this Court has recognized the amount of time and energy they can consume. *See, e.g. Keeney v. Tamayo*, 504 U.S. 1, 7 (1992) ("Federal habeas litigation also places a heavy burden on scarce judicial resources."). A recent study of federal habeas corpus claims found that there was 36,745 non-capital habeas claims filed between 2003 and 2004.[2] Because habeas is such a taxing and

[2]Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts*, 15 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.

common claim, the efficiency implications of the questions before this Court are very important.

Allowing for unaddressed claims for habeas corpus relief has two main implications, it could lead to piecemeal habeas corpus litigation, and it could complicate the appeals process. The benefits of avoiding piecemeal litigation have been recognized by this Court. *See Rose v. Lundy*, 455 U.S. 509, 520, (1982).[3] If district courts are not required to address all claims in habeas petitions, savvy petitioners could attempt to re-file these claims if they fail on other grounds. By setting a clear standard requiring that all claims are at least addressed by district courts, this potential for piecemeal litigation would be reduced.

The federal court system has a strong interest in assuring that district court decisions create final judgments. Several circuit courts have dismissed habeas claims because the district court failed to address some of the claims brought before the court on appeal. *See Stewart v. Bishop*, 403 F.2d 674, 682 (8th Cir 2008) (dismissing a case where one out of five claims was addressed by the district court); *See Tucker v. Johnson*, 242 F.3d 617, 623 (5th Cir. 2001) (declining to decide on matters not decided up by the district court). When district courts do not address all claims, it undermines the appeals process and causes redundant litigation. Petitioners denied an appeal on grounds that there was not a final judgment on one or more claims must then seek a final judgment. Unless

[3]This Court said in that case, "To the extent that the ['total exhaustion'] requirement reduces piecemeal litigation, both the courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review." *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

this Court sets a standard that clearly gives circuit courts the ability and instruction to remand any writs of habeas corpus where claims were not addressed, these inefficiencies will continue.

Prisoners with constitutional claims deserve to have their claims heard by a court. The Seventh Circuit in this case allowed claims to go unanswered. Not only is this unjust for the Petitioner, but it supports a system where these sorts of claims are not taken seriously. Non-capital habeas claims like the Petitioner's are important to the Constitution and the criminal justice system. "Win or lose, however, non-capital state prisoners who pursue habeas relief both contribute to the development of federal constitutional law, and sustain the operation of what we regard to be a critical systemic safeguard."[4] The Petitioner's Habeas I claims were never answered, and the implication of the Seventh Circuit permitting this is unacceptable.

B. There is ambiguity regarding if the holding in *Corcoran* is limited to capital claims or if it also applies to non-capital habeas claims.

The Seventh Circuit might have interpreted *Corcoran* as only applicable to capital writs for habeas corpus. In this case, the Seventh Circuit did not give any clear explanation of on what grounds it was denying the COA, other than that it found "no substantial showing of the denial of a constitutional right." App. 1. Although the District Court's failure to

[4]Blume, John H.; Johnson, Sheri Lynn; and Weyble, Keir M., *In Defense of Non capital Habeas: A Response to Hoffman and King*, Cornell Law Faculty Working Papers. Paper 66, at 9 (2010), http://scholarship.law.cornell.edu/clsops_papers/66.

address all claims was brought up in Petitioner-Appellant's motion for COA, the Seventh Circuit made no attempt to reconcile its decision with *Corcoran*. One interpretation of the Seventh Circuit's decision here is that it determined that *Corcoran* did not apply to non-capital claims.

This Court framed its holding such that the Seventh Circuit should have "permitted the District Court to consider Corcoran's unresolved challenges to his *death sentence* on remand." *Corcoran v. Levenhagen*, 130 S. Ct. 8, 9 (2009) (emphases added). This could be read as a procedural standard only applicable in capital cases. Regardless of the Court's conclusion on this question, granting Certiorari to this case presents an opportunity to clear up any potential ambiguity in or distinguishing of *Corcoran*.

C. The right to habeas corpus review in non-capital cases has been growing more limited and this case presents an opportunity to safeguard it from erosion.

The right to habeas corpus is so important that it was one of few rights directly enshrined in the constitution itself, before the addition of the Bill of Rights. *See* U.S. Const. art. I, § 9, cl. 2. As this Court pointed out in *Boumediene*, "The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). This is not the sort of right that can be limited to only a select few who are imprisoned and face a death sentence. Regardless of why someone is imprisoned, or what their ultimate sentence is,

"turning our backs on these prisoners and others like them would be unconscionable. It would also, on a symbolic level, represent an alarming erosion of the nation's commitment to individual liberty."[5] The principle promoted by *Corcoran* should be equally applicable, regardless of why the government is holding the person seeking a writ of habeas corpus.

There is a movement to limit federal habeas corpus remedies only to capital cases.[6] There are "profound societal costs that attend the exercise of habeas jurisdiction," *Smith v. Murray*, 477 U.S. 527, 539 (1986), that have caused some individuals to conclude that eliminating non-capital habeas corpus may be a way to save the federal judiciary funds, time, and energy.

The goal of decreasing the amount of funds and time spent on federal habeas corpus has led to what some have called a "perfect storm" of judicial, legislative, and social movements to restrict the ability for prisoners to receive habeas relief.[6] This Court could halt the development of "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal right." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). This Court has commented on its ability to change and develop habeas corpus procedural and law and it should take this opportunity to strengthen the protection in light of the possibility that many such legitimate claims will could be denied without reason.

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[5]Blume et al., *supra* note 5, at 66.

[6] *See generally*, Hoffmann, Joseph L. and King, Nancy J., *Rethinking the Federal Role in State Criminal Justice*, 84 N. Y. U. L. REV. 791 (2009).

[6]Blume et al., *supra* note 5, at 21.

See Wainwright v. Sykes, 433 U.S. 72, 81 (1977) ("The foregoing discussion of the other three is pertinent here only as it illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.").

Some circuit courts, including the Seventh, have made delineations between the amounts of attention claims should receive in a capital case as compared to others. *See Stewart v. Peters*, 958 F.2d 1379, 1388 (7th Cir. 1992), *modified*, 958 F.2d at 1388 (7th Cir. 1992), *cert. denied*, 506 U.S. 883,(1992) ("The better practice in habeas corpus death cases is for the judge to rule on all the grounds presented in the petition, so that the appellate court can decide the entire case in one round, without the interminable delays that characterize post-conviction proceedings in such cases."); *see Willie v. Maggio*, 737 F.2d 1372, 1377 (5th Cir 1984)("More important, however, particularly in a capital case, is the requirement that the district court set forth, albeit briefly and perhaps orally, those specific findings of fact and conclusions of law that underlie its ultimate conclusion to grant or deny relief."). The language in these two cases indicates a willingness to afford more procedural protection to capital habeas cases, which could deny individuals like the Petitioner any ability to have their constitutional claims heard.

Court has rejected differential treatment of habeas corpus claims based on the sentence. *Smith v. Murray*, 477 U.S. 527, 538 (1986) ("We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."). The Seventh Circuit's apparent willingness to apply the law surrounding habeas corpus more vigorously

depending on if it is a capital case or not goes against this Court's decision in *Smith*. This case provides an opportunity to stop the lower courts from unequally administering justice in the name of judicial economy and differential treatment based on the sentence of the individual.

IV. A COA should have been issued by the Seventh Circuit in this case.

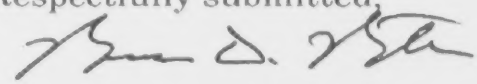
Finally, the Seventh Circuit should have issued a COA to the Petitioner and must be reversed here. The question the court must ask when determining if a COA should be issued is if the Petitioner can demonstrate that jurists of reason could disagree with the district court's conclusion or if jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The question in this case is simply if jurists of reason disagree with the District Court's resolution when it ignored an entire writ of habeas corpus. Given this Court's decision in *Corcoran*, the answer to that "threshold inquiry" is unequivocally in the affirmative. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.).

The Petitioner never got his day in court regarding Habeas Petition I. There is no procedural justification that should allow a person, who might have a legitimate constitutional claim, to fall by the wayside and never have that claim heard by a federal court. Here, the Habeas Petition I was never addressed by any federal court and this Court should grant Certiorari to remedy this injustice.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Petition for Certiorari be granted.

Respectfully submitted,



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IN THE

Supreme Court of the United States

RUSSELL W. ROACH,

Petitioner,

v.

JEFF WRIGLEY,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 16, 2010
Decided July 27, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 10-1018

RUSSELL ROACH,
Petitioner-Appellant,

v.

JEFF WRIGLEY,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No.
1:05-cv-1810-DFH-DML

Richard L. Young,
Chief Judge

ORDER

Russell Roach has filed a notice of appeal from the denial of his petition under 28 U.S.C.§ 2254 and an application for certificate of appealability This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

RUSSELL W. ROACH,)
Petitioner,)
v.) No.
)1:05-cv-1810-RLY-DML
)
SUPERINTENDENT)
JEFF WRIGLEY,)
Respondent.)

Entry Discussing Petition for Writ of Habeas Corpus

For the reasons explained in this Entry, the petition of Russell W. Roach for a writ of habeas corpus must be **denied**.

I. Applicable Law

As a person in custody pursuant to a state court judgment, to be eligible for a writ of habeas corpus Roach must demonstrate that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see *Guest v. McCann*, 474 F.3d 926, 931 (7th Cir. 2007). Review of petitioner Roach's habeas action is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lambert v. McBride*, 365 F.3d 557, 561 (7th Cir. 2004). Under the AEDPA, if a state court adjudicated a constitutional claim on the merits, a federal court may grant habeas relief only if the state court decision was contrary to, or involved an unreasonable application of, Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts in light of

the evidence presented in the state proceeding. 28 U.S.C. § 2254(d)(1), (2); *Early v. Packer*, 537 U.S. 3, 7-8 (2003); *Lambert*, 365 F.3d at 561.

> A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner.

Brown v. Payton, 544 U.S. 131, 141 (2005) (internal citations omitted); see also *Badelle v. Correll*, 452 F.3d 648, 653 (7th Cir. 2006). "The habeas applicant has the burden of proof to show that the application of federal law was unreasonable." *Harding v. Sternes*, 380 F.3d 1034, 1043 (7th Cir. 2004) (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)).

In addition to the foregoing substantive standard, "[a] state prisoner . . . may obtain federal habeas review of his claim only if he has exhausted his state remedies and avoided procedurally defaulting his claim." *Thomas v. McCaughtry*, 201 F.3d 995, 999 (7th Cir. 2000). "It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. Claims not so raised are considered defaulted." *Breard v. Greene*, 523 U.S. 371, 375 (1998) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). Procedural default "occurs when a claim could have been but was

not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court." *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992), *cert. denied*, 508 U.S. 962 (1993). When procedural default has occurred, it can be overcome if a habeas petitioner "can demonstrate either (a)cause for the default and prejudice (i.e., the errors worked to the petitioner's "actual and substantial disadvantage,"; or (b) that failure to consider his claim would result in a fundamental miscarriage of justice (i.e., a claim of actual innocence)." *Conner v. McBride*, 375 F.3d 643, 648 (7th Cir. 2004) (internal citations omitted); see also *Dellinger v. Bowen*, 301 F.3d 758, 764 (7th Cir. 2002), cert. denied, 537 U.S. 1214 (2003).

II. Background

Roach was convicted of murder in 1995. His conviction was affirmed on direct appeal in *Roach v. State*, 695 N.E.2d 934 (Ind. 1998)(Roach I), and the trial court's denial of Roach's petition for post-conviction relief was affirmed on appeal in *Roach v. State*, No. 49A05-312-PC-621 (Ind.Ct.App. December 6, 2004)(Roach II). He seeks habeas corpus relief based on his claims that (a) he was denied the effective assistance of counsel both at trial and in his direct appeal, (b) there was not sufficient evidence to support the jury's finding of an intent to kill, (c) the State withheld exculpatory evidence and suborned perjury of its witnesses at trial, (d) there was misconduct on the part of both the trial court and the prosecutor, and (e) the appellate courts of Indiana had the opportunity to review his claims and correct the errors pointed out to them, but failed to do so.

III. Discussion[7]

A. Assistance of Counsel

Roach makes the ubiquitous claim that he was denied the effective assistance of counsel. In order to have preserved this claim for federal habeas review, Roach is required to have "identif[ied] [to the Indiana state courts] the specific acts or omissions of counsel that form the basis for [her] claim of ineffective assistance." *Momient-El v. DeTella*, 118 F.3d 535, 541 (7th Cir. 1997) (internal quotation marks omitted). Thus, Roach cannot argue one theory to the state courts and another theory, based on different facts, to the federal court. *Everett v. Barnett*, 162 F.3d 498, 502 (7th Cir. 1998) (failing to argue in state court that counsel was ineffective for not calling a certain witness resulted in default, even though petitioner had previously argued that other witnesses should have been called by counsel); see also *Stevens v. McBride*, 489 F.3d 883, 893-94 (7th Cir. 2007); *United States ex rel. Bell v. Pierson*, 267 F.3d 544, 555 (7th Cir. 2001); *Whitehead v. Cowan*, 263 F.3d 708, 730 n.5 (7th Cir. 2001).

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[7] Findings of fact made by the state courts are presumed correct and are rebutted only by clear and convincing evidence. *Foster v. Schomig*, 223 F.3d 626, 631 (7th Cir. 2000) (applying 28 U.S.C. § 2254(e)(1)). Roach claims that there should not be a presumption of correctness because he has rebutted the state court determinations through clear and convincing evidence is unpersuasive. Roach has not shown by clear and convincing evidence, nor by any evidence at all, that the various recitations of evidence or factual findings by the Indiana state courts are not correct. Those findings of fact are therefore accepted for the purpose of this proceeding, and no relief or re-determination of the facts is available to Roach under § 2254(d)(2) with respect to any of the claims in this case. This means that the state courts' findings of fact are impervious to challenge in this case.

That, however, is precisely what Roach has done. The habeas version of his claim of ineffective assistance of counsel differs from the version presented to the Indiana state courts. Specifically, Roach claims in his habeas petition that trial counsel inadequately investigated and that trial counsel introduced his state burglary conviction. In Roach II, Roach raised the ineffectiveness claims that trial counsel was ineffective for failing to make a proper offer to prove to introduce an expert's testimony that Roach had suffered a concussion and that appellate counsel was ineffective for failing to ask the Supreme Court to remand for resentencing. The penalty for failing to fully and fairly present the habeas ineffective assistance of counsel claims to the state court is procedural default. *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006). This procedural default is compounded by the fact that Roach did not seek transfer of the ineffective assistance claim in Roach II to the Indiana Supreme Court. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (holding that "a prisoner who fails to present his claims in a petition for discretionary review to a state court of last resort" has not properly exhausted the claims for purposes of 28 U.S.C. § 2254(b)(1), and that the habeas petitioner's failure to present her "claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims."); *Hough v. Anderson*, 272 F.3d 878, 892-93 (7th Cir. 2001)(petitioner's failure to present issue to Indiana Supreme Court constituted procedural default). Roach's procedural defaults are unexcused here.[8] His

[8] Roach states in his reply to the return to order to show cause that he included his procedurally defaulted claims in his bid for a successive post-conviction action. However, this argument does not excuse his procedurally defaulted claims

unexcused procedural default prevents the court from reaching the merits of his claim of ineffective assistance of counsel.

B. Sufficiency of the Evidence

Roach claims that there was insufficient evidence of his intent to kill Grounds. Respondent states that Roach's claims were not presented to the Indiana appellate courts. However, Roach raised this claim on direct appeal.

States are free, within broad limits, to define the elements of a crime. *Eaglin v. Welborn*, 57 F.3d 496, 500 (7th Cir. 1995) (en banc). Once a state has done so, however, the due process clause of the Fourteenth Amendment requires a state to prove beyond a reasonable doubt each element of the crime. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); Eaglin, 57 F.3d at 500.

Under the AEDPA, and drawing from the standard established by *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), federal review of a challenge to the sufficiency of the evidence "turns on whether the state court provided fair process and engaged in reasoned, good-faith decision-making when applying Jackson's 'no rational trier of fact' test." *Gomez v. Acevedo*, 106 F.3d 192, 199 (7th Cir. 1997), vacated on other grounds, *Gomez v. DeTella*, 522 U.S. 801 (1997). The only appropriate inquiry under *Jackson*

> is whether, assuming the jury resolved all

Kirk v. State, 632 N.E.2d 776 (Ind.Ct.App. 1994) ("In seeking post-conviction relief, a petitioner must assert all available grounds for relief in his original post-conviction petition. P.C.R. 1(8)"), particularly where the state courts reject a successive effort.

> disputes in the state's favor and drew all inferences from that evidence, it would have been rational to convict. Not whether we would convict, but whether thoughtful people could convict.

Branion v. Gramly, 855 F.2d 1256, 1266 (7th Cir. 1988). The Indiana Supreme Court reviewed the evidence and found it sufficient: Roach argued that the State did not present sufficient evidence from which a jury could reasonably infer that he knowingly killed Grounds. Roach claims that he acted in self-defense. However, the Indiana Supreme Court disagreed, finding that:

> We find that sufficient evidence exists to sustain defendant's conviction. First, the State introduced evidence to show that defendant used a gun to shoot Grounds in the chest. The evidence also shows that the gun was fired from a distance of three feet or more away from Grounds. Finally, the evidence shows that Grounds had a BAC of .277. While it is true that the jury could infer from this evidence that defendant accidentally shot Grounds or that defendant shot Grounds in selfdefense, the jury could also reasonably infer that defendant knowingly killed Grounds. The jury could infer that defendant had control of the gun and the situation, but shot Grounds anyway.

Roach I, 695 N.E.2d at 941. The Indiana Supreme Court's discussion of the evidence provided Roach and the State of Indiana with fair process and constituted reasoned, goodfaith decision-making when applying Jackson's "no rational trier of fact" test. This determination that the evidence was sufficient did not

run afoul of the AEDPA standard as expressed in 28 U.S.C. § 2254(d)(1), and hence Roach is not entitled to relief based on this claim.

C. Exculpatory Evidence

Roach claims is that the State withheld exculpatory evidence and suborned perjury of its witnesses at trial. However, these claims were not presented to the Indiana appellate courts. "A habeas petitioner who has exhausted his state court remedies without properly asserting his federal claim at each level of state court review has procedurally defaulted that claim." Lewis v. Sternes, 390 F.3d 1019, 1026 (7th Cir. 2004). Roach has not overcome the consequence of his procedural default as to his claim that the State withheld exculpatory evidence and suborned perjury of its witnesses at trial.

D. Conduct of the Trial Court and of the Prosecutor

Roach claims that the trial court and the prosecutor committed plain error in the jury's presence. Again, however, this claim was not presented to the Indiana courts.[9] For the reasons set forth above, this claim is barred by procedural default. See *Lane v. Richards*, 957 F.2d 363, 366 (7th Cir.) (issues were not presented on direct appeal and relief would be barred by procedural default).

IV. Conclusion

Roach's conviction withstood challenge in the Indiana courts, and thus a presumption of constitutional

[9]The prosecutorial misconduct claims raised in Roach's direct appeal differ from those raised herein his petition for a writ of habeas corpus.

regularity attaches to it. See *Farmer v. Litscher*, 303 F.3d 840, 845 (7th Cir. 2002) (citing *Parke v. Raley*, 506 U.S. 20, 29-30 (1992)); *Milone v. Camp*, 22 F.3d 693, 698-99 (7th Cir. 1994) ("Federal courts can grant habeas relief only when there is a violation of federal statutory or constitutional law").[10] As the foregoing discussion demonstrates, this court's view is that he received all that the Constitution requires.

> For a trial to be constitutionally sound requires . . . a trial where the prosecutor must prove all elements of a crime beyond a reasonable doubt inorder to convict; where the prosecutor adheres to certain rules of conduct that guarantee a fair trial and a proper consideration of the defendant's theories and supporting evidence; where the jurors consider only evidence adduced by the parties and that a defendant has had an opportunity to rebut; and where a defendant enjoys the right to cross-examine adverse witnesses.

Gall v. Parker, 231 F.3d 265, 277-78 (6th Cir. 2000).

This court has carefully reviewed the state record in light of Roach's claims and has given such consideration to those claims as the limited scope of its review in a habeas corpus proceeding permits. "A defendant whose position depends on anything other than a straightforward application of established rules

[10]Obviously, this is not a presumption related to the AEDPA, but is "the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley*, 506 U.S. at 29 (citing Johnson v. Zerbst, 304 U.S. 458, 464, 468 (1938)).

cannot obtain a writ of habeas corpus." *Liegakos v. Cooke*, 106 F.3d 1381, 1388 (7th Cir. 1997). No such established rules entitle Roach to relief in this case. Roach's petition for a writ of habeas corpus is therefore denied.

IT IS SO ORDERED

12/01/2009 /s/ Richard L. Young
RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

RUSSELL W. ROACH,	)	
Petitioner,	)	
v.	)	No.
	)	1:05-cv-986-JDT-TAB
CECIL DAVIS, Warden,	)	
Respondent.	)	

Entry Concerning Selected Matters

The court, having considered the above action and the matters which are pending, makes the following rulings:

1. The petitioner's challenge to either predicate offense of the habitual offender determination associated with his present custody should have been presented as an adjunct to a challenge to the conviction for which he is currently incarcerated. The challenge to the 1983 Burglary conviction in this action, however, was filed before the challenge to his 1995 conviction for murder, for which he is presently confined. The challenge to the 1995 conviction has been docketed in this court as No. 1:05-cv-1810-DFH-VSS.

2. The Petitioner's motions to consolidate, docket no. 15 and no 16, are therefore **granted.** This action is thus **consolidated** with No. 1:05-cv-1810-DFH-VSS. For administrative purposes, the latter action shall remain

open, while this action shall be closed without prejudice. The claims presented in this action will be resolved, and all filings made in this action will be considered, in No. 1:05-cv-1810-DFH-VSS.

3. Judgment dismissing this action without prejudice shall no issue.

IT IS SO ORDERED.

Date: 08/14/2006 /s/ John Daniel Tinder
John Daniel Tinder, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

RUSSELL W. ROACH, Petitioner,	)	
v.	)	No.
	)	1:05-cv-1810-RLY-DML
SUPERINTENDENT JEFF WRIGLEY, Respondent.	)	

ENTRY

Petitioner Roach failed to prevail in his action seeking a writ of habeas corpus. His notice of appeal is accompanies by his petition for a certificate of appealability (COA).

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). "A petitioner satisfied this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 372. As the Supreme Court recently noted, when the district court has rejected the petitioner's constitutional claims on the merits, the showing required for the issuance of a CAO under § 2253 (c) is "straightforward: The petitioner

must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id.

There are no circumstances discernable from the pleadings or the record which satisfy these grounds. For the reasons which accompanied the dismissal of those claims in the Entry of December 2, 2009, therefore, Mr. Roach's request for the issuance of a certificate of appealability is **Denied.**

IT IS SO ORDERED.

01/06/2010 /s/ Richard L. Young
RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 2010

Before

RICHARD A. POSNER, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 10-1018

RUSSELL ROACH,
Petitioner-Appellant,

v.

JEFF WRIGLEY,
Respondent-Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 1:05-cv-1810-DFH-DML

Richard L. Young,
Chief Judge

ORDER

The petitioner-appellant filed a petition for rehearing on August 10, 2010. Both judges on the panel have voted to deny the petition. The petition is therefore **DENIED**.